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In the Supreme Court of the United States

CHARLES THOMAS DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF OF *AMICI CURIAE* CITIZENS FOR LAW AND ORDER AND THE DORIS TATE CRIME VICTIMS BUREAU URGING AFFIRMANCE

THEODORE M. COOPERSTEIN*

THEODORE M. COOPERSTEIN, P.C.
1815 Pennsylvania Avenue, N.W.
Suite 501
Washington, D.C. 20006
(202) 331-7895

**Counsel of Record*

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32 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. AN ADEQUATE LEGAL REMEDY EXISTS FOR CONSTITUTIONAL VIOLATIONS BY THE SOVEREIGN'S OFFICERS.	5
A. Wrongs of the Sovereign Are Attributable to Its Servants, Not to the Sovereign Itself.	5
B. The Law Affords A Cause of Action For Damages as an Established Remedy for Constitutional Torts.	9
II. NO NEED OR BASIS REMAINS FOR THE EQUITABLE REMEDY OF SUPPRESSION OF EVIDENCE.	15
A. The Existence of an Adequate Remedy at Law Obviates the Need for Equitable Measures to Redress Constitutional Wrongdoing.	16
B. The Court, No Less Than Congress, May Not Fashion a Rule to Redefine a Constitutional Right.	22
CONCLUSION	27

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine, 527 U.S. 706 (1999) 8, 23
Anderson v. Creighton, 483 U.S. 635 (1987) 18
Bell v. Hood, 327 U.S. 678 (1946) 9,10,17
Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) passim
Bradt v. Smith, 634 F.2d 796 (5th Cir.), *cert. denied*, 454 U.S. 830 (1981) 14
Bush v. Lucas, 462 U.S. 367 (1983) 19
Butz v. Economou, 438 U.S. 478 (1978) 19
Carlson v. Green, 446 U.S. 14 (1980) 12,13,15,20
Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 7
City of Boerne v. Flores, 521 U.S. 507 (1997) 25,26
Davis v. Passman, 442 U.S. 228 (1979) 12,13,19
Department of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999) 7
FDIC v. Meyer, 510 U.S. 471 (1994) 7
Heck v. Humphrey, 512 U.S. 477 (1994) 18
Irvine v. California, 347 U.S. 128 (1954) 22
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) passim

TABLE OF AUTHORITIES -- Continued

Page

Leatherman v. Tarrant County Narcotics Intelligence & Coord. Unit, 507 U.S. 163 (1993) 18
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 9,10
Miranda v. Arizona, 384 U.S. 436 (1966) passim
Mitchell v. Forsyth, 472 U.S. 511 (1985) 18
Monell v. Department of Social Servs., 436 U.S. 658 (1978) 18
Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 17
Nevada v. Hall, 440 U.S. 410 (1979) 7
Nixon v. Fitzgerald, 457 U.S. 731 (1982) 18
O'Shea v. Littleton, 414 U.S. 488 (1974) 17
Owen v. City of Independence, 445 U.S. 622 (1980) 18
Pulliam v. Allen, 466 U.S. 522 (1984) 18
Riley v. Dorton, 115 F.3d 1159 (4th Cir.), *cert. denied*, 522 U.S. 1030 (1997) 14
Schweiker v. Chilicky, 487 U.S. 412 (1988) 19
Siegert v. Gilley, 500 U.S. 226 (1991) 18
Texas & N.O. R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548 (1930) 9
United States v. Nafkha, 139 F.3d 913 (10th Cir. 1998) 1
United States v. Rivas-Lopez, 988 F. Supp. 1424 (D. Utah 1997) 1
Wilkins v. May, 872 F.2d 190 (7th Cir. 1989),

TABLE OF AUTHORITIES -- Continued

	Page
cert. denied sub nom. Wilkins v. McDaniel, 493 U.S. 1026 (1990)	14
Ex Parte Young, 209 U.S. 123 (1908)	8
Younger v. Harris, 401 U.S. 37 (1971)	17

CONSTITUTION AND STATUTES

U.S. Const. art. V	25
U.S. Const. art.VI, cl. 2	7
U.S. Const. amend. V	passim
U.S Const. amend. XI	8
18 U.S.C. § 3501	1,2,13
28 U.S.C. § 2680(h)	18
42 U.S.C. § 1983 *et seq.*	18

OTHER

William Blackstone, Commentaries on the Laws of England (1768)	5, 7
Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897)	16
Brief for the United States, *INS v. Lopez-Mendoza*, No. 83-491 (U.S. 1984)	20

INTEREST OF *AMICI CURIAE*[1]

Citizens for Law and Order ("CLO") is a nonprofit corporation founded in 1970 to monitor and improve the criminal justice system in the State of California. Among CLO's objectives are monitoring races for judicial office in California to ensure the proper administration of justice and monitoring federal legislation to see that criminal statutes are construed and applied in accordance with the United States Constitution. CLO has participated as an *amicus curiae* in previous litigation concerning the federal statute codified at 18 U.S.C.§ 3501, including the submission of briefs to the United States Court of Appeals for the Tenth Circuit, in *United States v. Nafkha*, 139 F.3d 913 (10th Cir. 1998), and to the United States District Court for the District of Utah, in *United States v. Rivas-Lopez*, 988 F. Supp. 1424 (D. Utah 1997).

The Doris Tate Crime Victims Bureau ("the Bureau") is a California nonprofit organization established in 1992 and dedicated to improving public safety and helping the victims of crime and their families. The Bureau advocates passage of

[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici*, its members, or counsel contributed money or services to the preparation or submission of this brief.

public safety legislation and legislation affecting crime victims and their rights. It monitors elected officials' votes on issues of public safety and victims' rights legislation, and it works to bring together and coordinate the efforts of crime victims organizations throughout California in order to increase their effectiveness. The Bureau is named after the late victims' rights crusader, Doris Tate, whose daughter Sharon was brutally murdered in 1969 by members of the Charles Manson cult.

The issue before this Court is the constitutionality of the federal statute codified at 18 U.S.C. § 3501, which in this case would permit the admission into evidence of petitioner Charles Dickerson's voluntary confession to multiple bank robberies, despite a technical violation of the Court's rule set out in *Miranda v. Arizona*, 384 U.S. 436 (1966), requiring the formal advice of four rights to any suspect prior to custodial interrogation. The possibility that suppression of truthful evidence in criminal trials might result from the Court's ruling on Section 3501 threatens to impede the interests of society at large, and the victims of crime in particular, in seeing justice done for criminal acts. CLO and the Bureau accordingly have a significant interest in the outcome of this case.

CLO and the Bureau urge the Court to affirm the ruling of the Fourth Circuit and uphold the constitutionality of 18 U.S.C. § 3501.

SUMMARY OF ARGUMENT

1. Where a constitutional violation occurs in the course of a criminal prosecution, there exists an adequate and effective remedy at law. Established law of this Court provides that a direct civil action for damages may be brought against individual constitutional tortfeasors. This legal remedy is in fact the preferable method of redressing intentional violations of the Constitution, by making those responsible pay a penalty for their actions. The remedy also serves to deter further misconduct by those same officials or future wrongdoers, who must personally take into account the cost of their actions. Accordingly, it is neither necessary nor advisable that courts suppress evidence as a sanction for constitutional violations to the rights of an accused.

2. In contrast, the present legacy of *Miranda* and its exclusionary rule lays a sanction on society and the sovereign people through the impairment of the system of justice. Likely as not, the offending officer suffers no more than wounded pride and one more entry in his win-loss record. Because the people are sovereign in our constitutional structure, sovereign immunity operates to shield the people from the sanctions properly attributable to the knowing or reckless conduct of the individual officer. The regime of private civil actions for

constitutional violations established and developed since the Court's ruling in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* remedies harm to the rights of the accused while it leaves to the public and individual victims their interest in seeing justice served. To preserve or continue the exclusionary rule under *Miranda*, in the face of this subsequent development, violates sovereign immunity. It also can lead the Court to exceed its own authority by improperly altering the extent and the nature of a constitutional right, outside the appropriate method of constitutional amendment.

ARGUMENT

It is helpful to begin from first principles and examine anew the problem of violations of the Constitution by law enforcement officers who coerce or mistreat the accused. After determining what remedies are in fact presently available to redress the violation of constitutional rights during criminal investigations, the Court might then evaluate the effectiveness and consistency of the *Miranda* ruling, and in particular its exclusionary rule, with those principles in today's context.

I. AN ADEQUATE LEGAL REMEDY EXISTS FOR CONSTITUTIONAL VIOLATIONS BY THE SOVEREIGN'S OFFICERS.

Criminal law enforcement in our history has always been a public matter consigned to the power and duties of the sovereign, rather than to the private individual. Law enforcement accordingly must be measured against the powers and authority specifically granted to the sovereign, and the limits upon the exercise of that power. When the officers of the law are found to have exceeded those limits, the resulting harms to individual rights merit relief, but that relief must take note of the fact that "the remedy in such cases is generally of a peculiar and eccentrical nature." 3 William Blackstone, Commentaries on the Laws of England *116 (1768).

A. Wrongs of the Sovereign Are Attributable to Its Servants, Not to the Sovereign Itself.

At the time of the Constitutional Convention, the principle of sovereign immunity was well established in English common law. As has often been stated since, the rule succinctly relies upon the concept that "the King can do no wrong." As more

fully known to the Framers, that principle had a reasoned basis that did not, and does not, preclude relief to the individual citizen harmed by a wrongful government act:

> That the king can do no wrong, is a necessary and fundamental principle of the English constitution: meaning only, as has formerly been observed, that, in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the king; nor is he, but his ministers, accountable for it to the people: and secondly, that the prerogative of the crown extends not to do any injury; for, being created for the benefit of the people, it cannot be exerted to their prejudice. Whenever therefore it happens, that, by misinformation or inadvertence, the crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign, (for who shall command the king?), yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute: and, as it presumes that to *know of* an injury and

> to *redress* it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved.

3 Blackstone, *supra*, *254-55 (emphasis original). *See also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949) ("If "the king can do no wrong, then it may be also assumed that if the king's agent does wrong that action cannot be the action of the king."). There was in fact a civil action available at English common law for wrongful criminal process. 4 Blackstone, *supra*, at *136 ("A conspiracy also to indict an innocent man of felony falsely and maliciously, who accordingly is indicted and acquitted, is a farther abuse and perversion of public justice; for which the party injured may ... have a civil action by writ of conspiracy").

Upon declaring independence, the people of the respective States succeeded to sovereignty at common law. *Nevada v. Hall*, 440 U.S. 410, 418 (1979); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 434-35 (1793) (Iredell, J., dissenting). Upon ratification of the Constitution, the United States became sovereign within its respective spheres under the Constitution. U.S. Const. art. VI, cl. 2; *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, ___, 119 S. Ct. 687, 690 (1999); *FDIC v.*

Meyer, 510 U.S. 471, 475 (1994). The United States and the respective States therefore enjoy general sovereign immunity within the state and federal courts. U.S Const. amend. XI; *see Alden v. Maine*, 527 U.S. 706, ___, 119 S. Ct. 2240, 2248 (1999).

Yet this sovereign immunity does not mean there is no relief for the individual who suffers the violation of a right under the Constitution. The government officer who violates the Constitution acts outside of his authority. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S at 689 (1949) ("where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions."); *id.* at 697 (challenged act was "unconstitutional use of their power and was, therefore not validly authorized by the sovereign."). A court may prohibit or enjoin future or continued unconstitutional conduct by an individual government officer. *Ex Parte Young*, 209 U.S. 123 (1908). More tellingly for the present case, the law also permits of an individual remedy in damages for past harms in violation of Constitutionally protected rights.

> [T]he fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him. ....

> .... In a suit against the officer to recover damages for the agent's personal actions that question is easily answered. The judgment sought will not require action by the sovereign or disturb the sovereign's property. There is, therefore, no jurisdictional difficulty.

Larson, 337 U.S. at 687. It is therefore most appropriate to visit the wrongful violation of the Constitution upon the officer or officers who performed the wrong against the sovereign's authority or will.

B. The Law Affords A Cause of Action For Damages as an Established Remedy for Constitutional Torts.

1. Over fifty years ago, this Court stated an already established principle that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. 678, 684 (1946) (citing to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162, 163 (1803); *Texas & N.O. R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 569, 570 (1930)). By alleging in his complaint that Agents of the Federal Bureau of Investigation

violated his Fourth and Fifth Amendment rights, plaintiff Arthur Bell properly stated a cause of action arising under the Constitution and laws of the United States. Without reaching the question of appropriate relief, the Court found there was federal jurisdiction to consider the claim. 327 U.S. at 682. The Court remanded the case for trial, and left open the determination of an appropriate remedy, which Bell contended would include damages against the individual Agents.

2. That damages are available in a direct civil action for violations of Constitutional rights became the settled law in the Court's opinion in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Court in *Bivens* continued where it left off in *Bell v. Hood*, and held that "violation of [the Fourth Amendment] by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct." *Id.* at 389.

Because "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," *Marbury v. Madison*, 5 U.S. at 163, the Court in *Bivens* held,

> That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.

Bivens, 403 U.S. at 395-96. The Court thereby gave effect to the principles of the Fourth Amendment and made those officials who must obey the Constitution personally responsible for its violation.

Mr. Justice Harlan elaborated on this reasoning, and on the Court's authority to so rule, in his concurring opinion in *Bivens,* agreeing "that a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected by the Fourth Amendment." *Id.* at 400. Justice Harlan wrote,

> I do not think that the fact that the interest is protected by the Constitution rather than statute or common law justifies the assertion that federal courts are powerless to grant damages in the absence of explicit congressional action authorizing the remedy. ....
> [T]he presumed availability of federal equitable relief against threatened invasions of constitutional interests appears entirely to negate the contention that the status of an interest as constitutionally protected divests

> federal courts of the power to grant damages absent express congressional authorization.

Id. at 403-404. "[T]he judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment." *Id.* at 407; *see Davis v. Passman*, 442 U.S. 228, 241 (1979) ("the judiciary is clearly discernable as the primary means through which these rights may be enforced"). It is therefore "entirely proper that these injuries be compensable according to uniform federal rules of law," 403 U.S. at 409, and that "[d]amages as a traditional form of compensation for invasion of a legally protected interest" be an available remedy at law. *Id.* at 408.

3. The *Bivens* cause of action extends beyond the Fourth Amendment, and permits aggrieved parties to seek relief for harm from violations of other Amendments in the Bill of Rights. *E.g., Davis v. Passman*, 442 U.S 228 (1979) (Fifth Amendment Due Process); *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment); *see also Davis v. Passman*, 442 U.S. at 252 (Powell, J., dissenting) ("To be sure, it has been clear – at least since *Bivens* – that in appropriate circumstances private causes of action may be inferred from provisions of the Constitution.") (citation omitted). "*Bivens* established that the victims of a constitutional

violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any congressional statute conferring such a right." *Carlson v. Green,* 446 U.S. at 18.

To state a claim under *Bivens*, a plaintiff must "assert[] a constitutionally protected right;" "state[] a cause of action which asserts this right;" and claim "relief in damages constitut[ing] an appropriate form of remedy." *Davis v. Passman*, 442 U.S. at 234. A plaintiff who properly pleads these elements must then proceed to "first demonstrate that his constitutional rights have been violated," after which he "should then be able to redress [his] injury in damages, a remedial mechanism normally available in the federal courts." *Id.* at 248 (citation omitted).

4. Criminal defendants, like Charles Dickerson, who claim their confessions were given in technical violation of *Miranda*, assert violations by federal law enforcement officers of their constitutional rights under the Fifth Amendment. The Fifth Amendment forbids compulsory self-incrimination. U.S. Const. amend. V. A confession deemed involuntary, whether by an irrebuttable presumption under *Miranda*, or by the trial court's factual determination in each case, *see* 18 U.S.C. § 3501, must necessarily be viewed as the result of a coercive or improper interrogation, and therefore as an actionable violation of the constitutional right to

due process. *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989) (Posner, Cir. J.) ("When the deprivation [of the constitutional right] occurs in the course of a police interrogation – a stage in the criminal justice process – it is fairly described as a denial of due process."), *cert. denied sub nom. Wilkins v. McDaniel*, 493 U.S. 1026 (1990). Other courts as well have suggested the availability of civil actions as a remedy for Fifth Amendment violations in custodial interrogation. *See Riley v. Dorton*, 115 F.3d 1159, 1164-66 (4th Cir.) (potential for claims under 42 U.S.C. § 1983), *cert. denied*, 522 U.S. 1030 (1997); *Bradt v. Smith*, 634 F.2d 796, 800 (5th Cir.) (§ 1983 claims), *cert. denied*, 454 U.S. 830 (1981).

Dickerson, and other criminal defendants like him, can accordingly seek relief in damages against the individual officers and Agents who interrogated him, under a *Bivens* cause of action for violations of his Fifth Amendment rights. It does not necessarily follow, however, that the Court must or should apply the exclusionary rule of *Miranda* to exclude Dickerson's confession from evidence at his criminal trial.

II. NO NEED OR BASIS REMAINS FOR THE EQUITABLE REMEDY OF SUPPRESSION OF EVIDENCE.

Whether or not one concurs in the merits of the initial implication by the *Bivens* Court of a private right of action for violation of the Constitution, *see, e.g., Carlson v. Green,* 446 U.S. at 31 (Rehnquist, J., dissenting), unless the Court today is willing to overrule *Bivens*, it should recognize that an established and adequate damages remedy at law is now available for the person who alleges a constitutional violation in the inducement of his confession to a crime. If petitioner Dickerson is alleging a constitutional violation (in addition to, or perhaps by reason of, a technical *Miranda* violation), he too could file suit. This is a substantially different circumstance than prevailed in 1966 when the Court issued its *Miranda* opinion, and accordingly, there no longer is the same justification for the blanket application of an exclusionary rule to otherwise truthful or probative evidence obtained from a defendant.

As Chief Justice Burger noted in his *Bivens* dissent, the implication of a damages remedy afforded the opportunity to revisit the sensibility and effectiveness of the exclusionary rule. Even more so today, almost thirty years later, "Our adherence

to the exclusionary rule, our resistance to change, and our refusal even to acknowledge the need for effective enforcement mechanisms bring to mind Holmes's well known statement:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. *It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.*

Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897) (quoted in *Bivens*, 403 U.S. at 419-20) (emphasis added).

The Court should therefore reconsider the exclusionary rule imposed by *Miranda*. *Cf.* 384 U.S. at 490 ("Judicial solutions to problems of constitutional dimension have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so.").

A. The Existence of an Adequate Remedy at Law Obviates the Need for Equitable Measures to Redress Constitutional Wrongdoing.

Since the Court's ruling in *Miranda*, State and federal courts have regularly suppressed

confessions as an equitable remedy for purported violations of the defendants' rights under the Fifth and Fourteenth Amendments. Viewed as a response to the wrongful act of a government officer, however, that remedy does not comport with the traditional requirements of the common law and equity as they have developed in American jurisprudence. Nor does it truly address the real problem with an effective answer.

A standard prerequisite for the exercise of equitable relief by a court is the absence of an adequate and effective remedy at law. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 380 (1992); *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974) ("basic doctrine of equity jurisprudence that courts of equity should not act ... when the moving party has an adequate remedy at law"); *Younger v. Harris*, 401 U.S. 37, 43-44 (1971). This may well have been the case with respect to coerced confessions in 1966 when the Court heard the *Miranda* case. *See Bell v. Hood*, 327 U.S. 678, 682 (1946). But the Court's later *Bivens* opinion admittedly created a new form of action against federal officers, not previously available in 1966. 403 U.S. at 389.

In other respects the legal landscape has changed as well. The United States has enacted a limited waiver of sovereign immunity for certain intentional torts that may be committed by federal

law enforcement officers. 28 U.S.C. § 2680(h) (Federal Tort Claims Act). Civil liability of State officers, and municipalities, for violations of the Fourteenth Amendment is now a well-established body of law under the Civil Rights Acts of 1866 and 1871, 42 U.S.C. § 1983 *et seq.*, and related case law precedents of this Court. *See, e.g., Owen v. City of Independence,* 445 U.S. 622 (1980); *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). Both *Bivens* and Section 1983 actions are now subject to a sophisticated body of law regarding pleading requirements, *e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coord. Unit*, 507 U.S. 163 (1993); *Siegert v. Gilley*, 500 U.S. 226 (1991); and defenses of qualified immunity, *e.g., Anderson v. Creighton*, 483 U.S. 635 (1987); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); or even absolute immunity, *e.g., Pulliam v. Allen*, 466 U.S. 522 (1984); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). In the criminal law context, civil actions for constitutional violations must await the outcome of appellate review of the criminal trial, and thereby do not risk interfering with the criminal justice system. *Heck v. Humphrey*, 512 U.S. 477 (1994).

It is difficult, then, if not impossible, to say that Dickerson and defendants like him lack meaningful and adequate legal remedy or relief. There is now in place a legal regime providing for actions at law, and that regime may in fact better

serve the ends of the Constitutional prohibitions at issue.[2]

As noted above, the problem underlying a constitutional violation in the criminal process is both conceptually and practically focused upon the individual government officer. The government can only act through its individual officers as its agents. *Larson,* 337 U.S. at 688 ("when the agents' actions are restrained, the sovereign itself may, through him, be restrained."). "All individuals, whatever their position in government, are subject to federal law." *Butz v. Economou*, 438 U.S. 478, 506 (1978) (quoted in *Davis v. Passman*, 442 U.S. at 246). But "however desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit." 433 U.S. at 410 (Harlan, J., concurring).

Direct civil liability of the individual officer more precisely addresses the problem and the resultant harm from the constitutional violation. It is more fitting that an official wrongdoer face

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[2] This is not to say that Congress might not supplant that regime by future legislation. But failing that, the *Bivens* action remains the primary vehicle for redress. *Cf. Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988) (No *Bivens* cause of action lies where "Congress has not failed to provide meaningful safeguards or remedies"); *Bush v. Lucas*, 462 U.S. 367, 386 (1983) (*Bivens* action foreclosed by "Government's comprehensive scheme" that "provides meaningful remedies for [federal] employees").

personal liability, and therefore be forced to internalize the costs of his intentional violations of the Constitution, rather than foist them off on the public.

> [T]he *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose. Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent.... It is almost axiomatic that the threat of damages has a deterrent effect, surely particularly so when the individual official faces personal financial liability.

Carlson v. Green, 446 U.S. at 21; *see Larson*, 337 U.S. at 687 ("the principle that an agent is liable for his own torts is an ancient one and applies even to certain acts of public officers"). The United States Department of Justice has itself argued this very point in the past: "Even if *Bivens* suits are relatively rare, the mere prospect of such being brought is a powerful disincentive to unlawful conduct. It defies common sense to suppose that fear of a suit against [a federal] officer in his individual capacity, in which he is faced with the possibility of personal liability, has no influence on his conduct." Brief for the United States at 34, *INS v. Lopez-Mendoza*, No. 83-491 (U.S. 1984).

The availability and precision of civil damages relief contrasts sharply with the overkill of the exclusionary rule. "If an effective alternative remedy is available, concern for the official observance of the law does not require adherence to the exclusionary rule." *Bivens*, 403 U.S. at 414 (Burger, C.J., dissenting). An officer who violates the defendant's Fifth Amendment right is liable in a civil *Bivens* action for damages. But if a government officer in the course of the criminal prosecution should seek to introduce the resulting confession as evidence at trial, "the action itself cannot be enjoined or directed, because it is also the action of the sovereign." *Larson*, 337 U.S. at 695.

The exclusionary rule of *Miranda* "does not apply any direct sanction to the individual official whose illegal conduct results in the exclusion of evidence in a criminal trial." 403 U.S. at 416.

> Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches.

Irvine v. California, 347 U.S. 128, 136 (1954) (quoted in *Bivens*, 403 U.S. at 413).

Earlier Courts acted on "a theory that suppression of evidence in these circumstances was imperative to deter law enforcement authorities from using improper methods to obtain evidence." 403 U.S. at 413. Yet the effect of exclusion, and attendant acquittal or dismissal of a criminal case, on the law enforcement officer is typically minimal: another addition to the won-loss column, and perhaps wounded pride. *See* 403 U.S. at 416 ("The doctrine deprives the police in no real sense; except that apprehending wrongdoers is their business, police have no more stake in successful prosecutions than the prosecutors or the public."). The true burden of exclusion falls upon the people as a whole, and in particular the past or future victims of crime. This cannot be the intent of the exclusionary rule, and indeed it may not be permissible.

B. The Court, No Less Than Congress, May Not Fashion a Rule to Redefine a Constitutional Right.

1. In excluding otherwise admissible evidence from a criminal trial, a court is in effect imposing a sanction upon a party litigant for its conduct outside the courtroom, prior to the

commencement of the action. No less than if it were to entertain a direct action for the same relief by the defendant against the government, the trial court in so doing is visiting liability and compulsion on the government, and through it the people, in direct contravention of the principle of sovereign immunity. *See Alden v. Maine*, 119 S. Ct. at 2268 ("the Constitution begins with the principle that sovereignty rests with the people.").

In barring the use of otherwise truthful evidence, a court uses its coercive and injunctive power to punish or redress a government actor's conduct.

> The compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred, not because it is a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction.

Larson, 337 U.S. at 688. Exclusion has no effect upon the law enforcement officer, who is not a party to the case, and at most might be a witness. The prosecuting attorneys and the investigating officers are all certainly subject to court authority for their

conduct before the bar, but the presumed violation of the defendant's Fifth Amendment right necessarily took place before trial, outside the presiding criminal court's immediate reach.

In short, the exclusionary rule is not directed at the merits of the evidence or its probative value, but instead is an attempt to exact a penalty in response to a constitutional violation. But that penalty falls on the wrong party, namely the sovereign people; it addresses conduct not attributable to them, the conduct of the official constitutional wrongdoer. The officer at fault is usually not before the criminal court, but will nearly always, under the current system of *Bivens* and its progeny, be amenable to a private civil action.

> For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question....

Larson, 337 U.S. at 704. The continuation of *Miranda*'s exclusionary rule, in the presence of the developed alternatives of civil liability under *Bivens*, violates sovereign immunity at both the State and federal levels.

2. The Court has previously ruled, in the context of a Congressional statute that purported to enact prophylactic remedial measures against unconstitutional actions, that there must be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997). Failure of the measure to meet this test indicates that the measure was really an attempt to rewrite the constitutional provision.

This Congress cannot do, as it alone is not empowered to amend or alter any aspect of the Constitution or its protections. U.S. Const. art. V. Yet, just as Congress, a single branch of the federal government, may not alter or amend the Constitution by itself, the same caution must guide the rulings of the Court as it interprets these constitutional rights. The Court must take care, in defining the rights of defendants under the Fifth Amendment and the actions of the government that may violate them, not to change the nature or extent

of the right in an effort to absolutely guarantee it from violation.

The right at issue in this case is the right to be free from coercion during a criminal interrogation. The right is not one to be free from the introduction of truthful evidence. The exclusion of evidence is an imprecise overreaction that does not address the specific harm, protect the right at issue, or bring its weight to bear on the appropriate wrongdoer who actually violated that right. In this sense, exclusion of evidence lacks "congruence and proportionality between the injury to be prevented or remedied and the means adjusted to that end." *City of Boerne*, 521 U.S. at 508.

If the defendant's confession in fact was voluntary, then there has been no constitutional violation. It follows therefore that no remedy would be needed. *Miranda*'s exclusionary rule in that instance becomes a cure without an ailment, and a measure that only harms society by impairing the process of justice. If the Court should maintain the exclusionary rule of *Miranda* as a constitutional imperative, the Court would in effect improperly alter the Fifth Amendment and the nature of the right to be free from self-incrimination, beyond the contours or limits within which the Framers intended it to operate.

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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THEODORE M. COOPERSTEIN*

THEODORE M. COOPERSTEIN, P.C.
1815 Pennsylvania Avenue, N.W.
Suite 501
Washington, D.C. 20006
(202) 331-7895
**Counsel of Record*